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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In re:

4 CUSTOMS AND TAX ADMINISTRATION OF  
5 THE KINGDOM OF DENMARK (SKAT) TAX  
6 REFUND LITIGATION

18-MD-2865 (LAK)

7 This paper applies to All Cases.

8 November 5, 2018  
9 2:00 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 HUGHES HUBBARD & REED LLP  
15 Attorneys for Plaintiff SKAT  
16 BY: SARAH L. CAVE  
17 MARC A. WEINSTEIN  
18 WILLIAM R. MAGUIRE

19 CAPLIN & DRYSDALE, CHARTERED  
20 Attorneys for Defendants The Bradley London  
21 Pension Plan and Boston Bradley, et al.  
22 BY: MARK D. ALLISON  
23 ZHANNA A. ZIERING

24 WILLIAMS & CONNOLLY LLP  
25 Attorneys for Sander Gerber Pension Plan  
BY: AMY B. MCKINLAY  
BRYAN C. SKARLATOS  
STEPHEN D. ANDREWS  
ERIC SMITH

1b5dcusM

## 1 APPEARANCES CONTINUED

2 MORVILLO, ABRAMOWITZ, GRAND, IASON &amp; ANNELLO P.C.

3 Attorneys for Adam LaRosa

4 BY: EDWARD M. SPIRO

5 GUSRAE, KAPLAN, NUSBAUM, PLLC

6 Attorneys for Goldstein Law Group PC 401(k)

7 Profit Sharing Plan and Sheldon Goldstein

8 BY: JOSEPH CHRISTOPHER ALBANESE

9 MARTIN H. KAPLAN

10 DEWEY PEGNO &amp; KRAMARSKY

11 Attorneys for Michael Ben-Jacob

12 BY: THOMAS E.L. DEWEY

13 KATTEN MUCHIN ROSENMAN LLP

14 Attorneys for Defendant Robert Klugman

15 BY: MICHAEL ROSENSAFT

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17 THE CLERK: In re: Customs and Tax Administration of  
18 the Kingdom of Denmark (SKAT) Tax Refund Litigation.

19 Counsel for plaintiff SKAT, are you ready?

20 MR. WEINSTEIN: Yes, your Honor. Good afternoon, your  
21 Honor. Mark Weinstein and Bill Maguire and Sarah Cave from  
22 Hughes Hubbard for plaintiff.

23 THE COURT: Good afternoon.

24 THE CLERK: Counsel for defendants Bradley London  
25 Pension Plan and Doston Bradley, are you ready?26 MR. ALLISON: Yes, your Honor. Mark Allison for those  
27 defendants and about three dozen others that are before this  
28 Court.

1b5dcusM

1                   THE COURT: I've just asked my secretary how many of  
2 these cases we have now and she couldn't count that high. Good  
3 afternoon.

4                   THE CLERK: Defendant Sander Gerber Pension Plan, are  
5 you ready?

6                   MR. ANDREWS: Yes, your Honor. Good afternoon, your  
7 Honor. Stephen Andrews and Amy McKinlay, from Williams &  
8 Connolly.

9                   THE COURT: Good afternoon.

10                  THE CLERK: Defendant Adam LaRosa, are you ready?

11                  MR. SPIRO: Yes, your Honor. Edward Spiro, of  
12 Morvillo, Abramowitz, Grand, Iason & Annello.

13                  THE COURT: Good afternoon.

14                  MR. SPIRO: Good afternoon, your Honor.

15                  THE CLERK: Defendant Goldstein Law Group Profit  
16 Sharing Plan and Sheldon Goldstein, are you ready?

17                  MR. KAPLAN: Yes. Good afternoon, your Honor. Martin  
18 H. Kaplan, Gusrae, Kaplan, Nusbaum, PLLC, and to my right is my  
19 associate Christopher Albanese.

20                  THE COURT: Good afternoon.

21                  MR. KAPLAN: Good afternoon, your Honor.

22                  THE CLERK: Defendant Michael Ben-Jacob, are you  
23 ready?

24                  MR. DEWEY: Yes, we are. Good afternoon, your Honor.  
25 Tom Dewy, from Dewey Pegno & Kramarsky.

1b5dcusM

1 THE COURT: Good afternoon.

2 THE CLERK: And defendant Robert Klugman, are you  
3 ready?

4 MR. ROSENSAFT: Yes, your Honor. Good afternoon.  
5 Michael Rosensaft for defendant Robert Klugman.

6 THE COURT: Good afternoon.

7 OK. Counsel.

8 MR. ALLISON: Your Honor --

9 THE COURT: Yes. I would appreciate that.

10 MR. ALLISON: Thank you.

11 THE COURT: Let's figure about a half hour for the  
12 defense and a half hour for the plaintiff.

13 MR. ALLISON: Sure. No problem, your Honor.

14 Your Honor, may it please the Court? Defendants have  
15 brought a motion to dismiss on two principal grounds which  
16 we're happy to cover both today for your Honor. One is a  
17 12(b)(1) motion to dismiss on grounds under the revenue rule,  
18 which your Honor obviously is familiar with. And, your Honor,  
19 the revenue rule obviously is a well-developed common law  
20 doctrine that bars U.S. courts in this case from enforcing the  
21 tax revenue laws of foreign jurisdictions, and that can apply  
22 either with respect to final tax judgments or unadjudicated tax  
23 claims.

24 This case, your Honor, from defendants' perspective,  
25 falls squarely into the revenue rule jurisprudence that has

1b5dcusM

1       been developed by this jurisdiction and other courts in the  
2       U.S. This is, in our view, very much your classic revenue rule  
3       fact pattern. The genesis of this litigation is the filing of  
4       tax refund claims by the defendants that were filed with SKAT,  
5       which is the plaintiff here, on standard tax refund claim forms  
6       that were issued by SKAT, that included all the supporting  
7       documentation required by SKAT for those tax refund claims, and  
8       which resulted in the payment of tax refund amounts to the  
9       defendants, at least to the defendant pension plans in this  
10      case. SKAT later determined that it erred in issuing those tax  
11      refunds and through their own internal tax administrative  
12      proceedings that are currently ongoing in Denmark have demanded  
13      the return of those tax refunds.

14               The amounts in dispute in this case, your Honor,  
15      exactly equal the amount of the tax refunds that are in dispute  
16      in Denmark. They are the exact same dollar or kroner amounts.

17               The tax refund claims themselves that are in dispute  
18      in Denmark are identified and listed in each of the complaints  
19      in these cases, and they match exactly those that are in  
20      dispute in Denmark.

21               THE COURT: Let me pose a hypothetical to you.  
22      Suppose two guys break into the Danish Central Bank and steal  
23      20 million Euro and flee to the United States and Denmark sues  
24      to recover the money. Does the revenue rule bar that claim?

25               MR. ALLISON: In my view, my personal view, your

1b5dcusM

1 Honor, no, the revenue rule would not apply in that case.

2 THE COURT: And that's true even though the money they  
3 stole were tax revenues collected by the Kingdom of Denmark,  
4 right?

5 MR. ALLISON: Well, in that case it is not tax  
6 revenue. The character that makes --

7 THE COURT: What do you think got? Charitable  
8 contributions?

9 MR. ALLISON: Well, your Honor, if I walked into --  
10 maybe to use a little bit more stark example. If I walked into  
11 SKAT's office in Copenhagen -- I assume that they have the  
12 equivalent of IRS offices around Denmark. If I walk into the  
13 office with a gun -- if I may use that term here -- and I say  
14 "Give me all your money," I'm not implicating the Danish tax  
15 system by doing that.

16 THE COURT: Even though the money is tax revenue.

17 MR. ALLISON: Well, all money is fungible, and all of  
18 it starts someplace as tax revenue presumably. But in that  
19 context, I am not invoking the tax administrative process in  
20 order to get that money. I have not filed a tax return. I'm  
21 not doing anything through the administrative proceedings --  
22 the tax administrative proceedings --

23 THE COURT: Suppose, for the sake of discussion, that  
24 every single piece of supporting documentation that went along  
25 with the forms was forged.

1b5dcusM

1                   MR. ALLISON: It makes no difference, your Honor. The  
2 revenue rule applies because we've implicated the tax system in  
3 order to generate those funds.

4                   And the revenue rule, as far as I could tell --

5                   THE COURT: You've implicated the tax system to  
6 generate the funds. So you've implicated the tax system by  
7 submitting forged documents, humph?

8                   MR. ALLISON: Correct, your Honor. No differently  
9 than in the United States if I file -- to use an example, if I  
10 file a refund claim pursuant to the earned income tax credit, I  
11 file that claim and I make up the amount of income that I've  
12 earned that results in this refundable tax credit. I've made  
13 it up. I falsely claimed that I earned that income. The  
14 Internal Revenue Service's process for getting that money back  
15 is through the tax system. It should be no different because  
16 we're talking about a foreign jurisdiction in which allegedly  
17 the same thing occurred, even though that allegation --

18                   THE COURT: Your position is that no matter what the  
19 crime, if it's committed against a taxing agency of a foreign  
20 government, the foreign government cannot resort to the U.S.  
21 courts to recover the proceeds of the crime?

22                   MR. ALLISON: To be more precise, it has to be done  
23 through the tax procedures against that tax agency. It can't  
24 be just random like using a gun. There has got to be something  
25 that ignites the process, and that is usually done through a

1b5dcusM

1 tax return. It could be a tax return. It could be a tax  
2 refund claim. But one of those things has to --

3 THE COURT: How is that a defensible principle?

4 MR. ALLISON: Well, your Honor, if you look at the  
5 revenue rule jurisprudence -- of course, your Honor is aware of  
6 it -- or if you look at the treaty between Denmark and the  
7 United States, there is no subrogation, no depredation there  
8 between filing a refund claim by mistake or through an  
9 inadvertent error or negligence or through tax fraud or through  
10 really bad fraud. The key is that you've done something that  
11 results in the payment -- or the nonpayment of tax revenue.  
12 And that ultimately leads to the foreign tax jurisdiction --

13 THE COURT: Your position would be the same if they  
14 filed forged documents along with the refund claim and bribed  
15 an official of the Danish government to overlook the forgery?

16 MR. ALLISON: I think there are several cases in the  
17 revenue rule jurisprudence that involve the claim of forged  
18 documents, but that doesn't seem to be the differentiation in  
19 any of those --

20 THE COURT: How about the question I just asked?

21 MR. ALLISON: I'm sorry, your Honor. If you could  
22 repeat it?

23 THE COURT: Suppose they bribed a senior official of  
24 the Danish tax authorities to overlook the forgeries. Denmark  
25 would have no recourse in the United States, right?

1b5dcusM

1                   MR. ALLISON: Against the recipients of those  
2 benefits, yes, that's right. They could go after the person  
3 that they bribed in Denmark, if that be the case. But the  
4 connection between the taxpayer and the tax authority is the  
5 receipt of something that was denominated as tax revenue as a  
6 result of filing, whether forged or not, a take return or a tax  
7 refund claim that resulted in that payment. That has to be the  
8 differentiation. Otherwise, we are going to be stuck in this  
9 quagmire as to what's the difference between something that  
10 invokes or implicates the tax system and your example of  
11 somebody just, you know, walking in with a gun or somehow  
12 otherwise engineering a payment.

13                   There are any number of other examples, your Honor.  
14 If I am a vendor of computers and I sell computers to SKAT,  
15 like I would to any other potential party, and I rip them off,  
16 I say I'm selling Apple computers and it turns out that they  
17 are fraudulent, they are not really Apple computers and I've  
18 ripped them off, that has nothing to do with the fact that the  
19 recipient of those services or those products is SKAT as a  
20 Danish tax authority. It is just another recipient of a  
21 fraudulent transaction but does not involve the tax system  
22 itself.

23                   But, your Honor, in this case, just to continue, this  
24 is not the examples you've given. This is a much more  
25 conventional situation. The dispute here is not about whether

1b5dcusM

1 somebody held a gun and walked in to steal money. Despite the  
2 characterization as something as theft or not, that is not the  
3 issue.

4           But to put a fine point on why the revenue rule needs  
5 to apply in a context like this is that we have the added  
6 issue, which your Honor is familiar with from the R.J. Reynolds  
7 Canada case, which is we have a treaty that backstops this, and  
8 the treaty between the United States and Denmark defines the  
9 negotiations between the two governments as to when and how tax  
10 collection should be -- tax collection assistance should be  
11 granted by one government to the other. That treaty defines  
12 the limits of that service by the Internal Revenue Service.  
13 And the fact is that those provisions in this context would bar  
14 SKAT from being able to obtain that assistance from the  
15 Internal Revenue Service. But even if there was --

16           THE COURT: They are not attempting to do that.

17           MR. ALLISON: They are not, your Honor, and that's an  
18 important point. They are not because they know they cannot.  
19 So it seemed ironic for SKAT to be able to go around a  
20 negotiated treaty -- just as in Canada, to be able to go around  
21 the treaty and suddenly say, well, we need the U.S. courts to  
22 intervene because the treaty that we negotiated between our  
23 executive branches doesn't permit it. That would be a very  
24 problematic circumstance, and that's why, at least as far as we  
25 know, SKAT has not attempted to do that.

1b5dcusM

1           But you raise an interesting point. Even though SKAT  
2 has, as far as we know, not attempted to go through the treaty  
3 to get the benefit of some kind of assistance, they have in  
4 fact used the treaty to obtain information relevant to these  
5 cases. So they know that this is a tax case and, hence, the  
6 need to use the tax treaty to get information from the Internal  
7 Revenue Service. So, yeah, if you want to use --

8           THE COURT: And where in the complaint will I find  
9 that?

10           MR. ALLISON: You will not find it in the complaint.  
11 That was an exhibit that we included in our last submission as  
12 one of the examples of where SKAT has interacted with the  
13 Internal Revenue Service.

14           THE COURT: So this is an argument on a motion to  
15 dismiss the complaint that you introduced by (a) material  
16 outside the complaint, (b) for the first time in the reply  
17 papers, and what makes you think I'm even going to read it on  
18 this motion?

19           MR. ALLISON: Whether you read it or not, your Honor,  
20 the fact is that we were faced with this in response to SKAT's  
21 opposition, and the reality is that that is occurring. And,  
22 actually, you can see it, your Honor, just as another  
23 example --

24           THE COURT: We don't usually try the facts on motions  
25 to dismiss.

1b5dcusM

1                   MR. ALLISON: Understood, your Honor. We are only  
2 responding to the facts as alleged in the original complaints.  
3 There is jurisprudence that does allow the submission of  
4 additional information in the context of a 12(b)(1) motion --

5                   THE COURT: Why is this 12(b)(1) in addition to  
6 12(b)(6)?

7                   MR. ALLISON: It is 12(b)(1) because it is a subject  
8 matter jurisdiction issue in the first instance.

9                   THE COURT: How is that true, as opposed to a failure  
10 to state a claim upon which relief may be granted?

11                  MR. ALLISON: I think they certainly overlap your  
12 Honor, there is no doubt about that.

13                  THE COURT: And the general rule is that unless the  
14 claim is essentially preposterous, it's treated under 12(b)(6).

15                  MR. ALLISON: Understood, your Honor, but I believe  
16 that --

17                  THE COURT: That is Bell v. Hood in 1946.

18                  MR. ALLISON: Understood, your Honor. But I believe  
19 that the revenue rule jurisprudence to date has well respected  
20 the use of 12(b)(1) for these purposes.

21                  THE COURT: Has the Supreme Court?

22                  MR. ALLISON: I don't believe the Supreme Court has  
23 addressed that issue.

24                  THE COURT: Has the Second Circuit?

25                  MR. ALLISON: I can't remember if it came up in Canada

1b5dcusM

1 or not.

2                   But that said, your Honor, I don't think the point  
3 needs --

4                   THE COURT: It certainly was not the lynchpin of it.

5                   MR. ALLISON: It was not. The lynchpin or at least  
6 not the lynchpin but one of the critical issues in Canada and  
7 R.J. Reynolds was the purpose of the treaty. And the fact is  
8 that treaty does play an important role here in defining the  
9 relationship between the U.S. and the Danish government on this  
10 exact issue. And certainly would be appropriate, we believe,  
11 for SKAT --

12                   THE COURT: On what exact issue?

13                   MR. ALLISON: I'm sorry?

14                   THE COURT: On what exact issue?

15                   MR. ALLISON: On the appropriateness of applying the  
16 revenue rule in a circumstance where the executive branch of  
17 the political governments have addressed this issue.

18                   THE COURT: Doesn't the treaty address the revenue  
19 rule?

20                   MR. ALLISON: It does.

21                   THE COURT: Where?

22                   MR. ALLISON: In Article 27. Article 27, the treaty,  
23 defines when and how SKAT may seek assistance from the Internal  
24 Revenue Service --

25                   THE COURT: That's not the revenue rule. That's when

1b5dcusM

1       they can seek the assistance of the IRS --

2            MR. ALLISON: Correct.

3            THE COURT: Which we agreed is not this case.

4            MR. ALLISON: Well, what I believe, your Honor, is  
5        that paragraph 8 of Article 27 absolutely prohibits -- it  
6        eliminates the discretion of the Internal Revenue Service to  
7        provide assistance of any kind to SKAT in a circumstance where  
8        there is a U.S. taxpayer involved. And how that could suddenly  
9        be avoided by going through the U.S. court system, particularly  
10       when there can't be any dispute that this is a tax issue, first  
11       and foremost, this is about the filing of a tax refund claim --

12           THE COURT: That's one of the great -- well, I won't  
13        characterize it -- there is a very big dispute about that, as  
14        you well know.

15           MR. ALLISON: Well, your Honor, put it this way, but  
16        for the filing of that tax refund claim, we would not be here.  
17        It is only because of that tax refund claim that SKAT is  
18        pursuing this. And it is only because of that tax refund claim  
19        that tax revenue was paid out to the taxpayers. There is no  
20        other circumstance in which this litigation would exist --

21           THE COURT: Tax revenue is paid out when somebody  
22        holds up a bank with government funds in it.

23           MR. ALLISON: That may be the case, your Honor, but it  
24        is not the result of filing -- of invoking, implicating the tax  
25        system. That has to be the distinction, otherwise everything

1b5dcusM

1 gets swept under the rug and the revenue rule never applies.

2 Your Honor, just to take it a step further. In our  
3 view, there is no doubt, this is an attempt at a direct  
4 enforcement of a foreign tax revenue law. I mean, that is what  
5 this is about. It is not even a remote coincidence that  
6 everything going on in Denmark exactly matches what is being  
7 requested here -- the same tax refund claims, the same tax  
8 revenue dollars or kroner. Those are the exact same issues.  
9 But even if we somehow get past that, we still have the issue  
10 of an indirect enforcement effort here, and this certainly  
11 would fall under that circumstance, your Honor.

12 The way SKAT presents this is, as your Honor is sort  
13 of addressing, is that this is just your plain vanilla theft,  
14 that this is just an outright theft, it is no different than  
15 you walking into an office with a gun and demanding money. But  
16 the reality is -- and as a result of that, SKAT says, you know,  
17 these are not taxpayers, there's no legitimate connection to  
18 the Danish tax system. But the revenue rule jurisprudence,  
19 including in Canada, R.J. Reynolds, tells us, informs us, and  
20 instructs us that we have to look at the underlying substance  
21 of what is happening here, not the mere forum, not the mere  
22 claim that this is theft and somehow a simple state law fraud  
23 claim. This is in substance a tax issue. But in arguing --

24 THE COURT: This in substance is alleged to be a  
25 gigantic fraud perpetrated in the context of procuring tax

1b5dcusM

1 returns by people who weren't even taxpayers.

2 MR. ALLISON: That is the highlighted spin from SKAT,  
3 yes. I'll grant you that is the way they love to characterize  
4 this. But it doesn't change how this started, which is through  
5 a tax refund claim.

6 But even taking that aside, your Honor, the underlying  
7 substantive issue that we have to look at, and that is really  
8 the issue in the cases in Denmark, the way SKAT presents it is,  
9 who is the owner. They are saying that these are not the real  
10 owners of the Danish stock for which dividends were paid and  
11 for which withholding tax was credited. That is actually not  
12 the issue. The issue is who is the beneficial owner of the  
13 stock. That's a different question. What it means to be a  
14 beneficial owner of stock is potentially very different than  
15 what it means to be the owner.

16 THE COURT: The complaint alleges that they are not  
17 owners.

18 MR. ALLISON: Correct.

19 THE COURT: Period.

20 MR. ALLISON: Correct, your Honor. But the tax  
21 refund --

22 THE COURT: I am obliged to assume that that is true  
23 for purposes of deciding this motion, right?

24 MR. ALLISON: For purposes of this motion, it is  
25 certainly something to be taken into account.

1b5dcusM

1                   THE COURT: No, not "taken into account," obliged to  
2 assume the truth.

3                   MR. ALLISON: Your Honor, it doesn't make a  
4 difference. It doesn't make a difference whether it is  
5 described as owner or beneficial owner; you still have the same  
6 problem. The tax refund claims themselves only required the  
7 people seeking a refund to identify themselves as the  
8 beneficial owner. That is what they claimed on those forms.

9                   THE COURT: And if they come in and prove at trial  
10 that they weren't the owner, the beneficial owner, the  
11 equitable owner, the rabbit who had the ownership interest,  
12 they win, right?

13                   MR. ALLISON: I certainly would hope that they would  
14 win. But, your Honor, that takes us into a very big leap,  
15 because the analysis of whether they are the owner, the  
16 beneficial owner, the equitable owner, tax owner, whatever  
17 characterization you want to give to it --

18                   THE COURT: The imaginary owner.

19                   MR. ALLISON: The imaginary, whatever characterization  
20 you want to give to it, your Honor, is still a legal question  
21 and requires an analysis of Danish tax law. That is why the  
22 indirect enforcement issue is still important.

23                   THE COURT: Suppose one of the defendants comes in and  
24 testifies at deposition that "I never owned it. I was not a  
25 beneficial owner. I never had any interest in it. I never saw

1b5dcusM

1 these papers. I don't know who these people are. It's all a  
2 hoax. I got nothing to do with this." How about that?

3 MR. ALLISON: Well, except, your Honor, we're not at  
4 that point, and the only allegation in the complaint is that  
5 they were not the owner. It doesn't say that these were made  
6 up, manufactured, hoaxes. It doesn't say any of that. It just  
7 says we believe that they were not the owner.

8 And in determining ownership, we have to ask ourselves  
9 any number of questions that could only be addressed by Danish  
10 tax law. For example, what does it mean --

11 THE COURT: You think the facts have no bearing  
12 whatsoever on any conceivable state of circumstances?

13 MR. ALLISON: The relevant question at this juncture  
14 is whether what has been pled establishes this as something  
15 that implicates the revenue rule or not; you know, the court  
16 has subject matter jurisdiction or it doesn't; or it's been  
17 properly pled or it hasn't. And that determination, even to  
18 what your Honor said before, is based on what they say in the  
19 complaint, what SKAT says in the complaint. It is just that  
20 they have not established -- or we don't believe that whatever  
21 spin they want to give, that they were the owner.

22 THE COURT: It is not spin. It doesn't say any of the  
23 things you just imagined.

24 MR. ALLISON: But, your Honor --

25 THE COURT: It doesn't -- shall I read it to you?

1b5dcusM

1 MR. ALLISON: Please, your Honor.

2 THE COURT: "These applications were fraudulent  
3 because the claimants did not own the shares that they claim to  
4 own." That's what it says. Not that "we believe," not that  
5 "we suspect," or whatever else you hypothesized.

6 MR. ALLISON: Your Honor, in order to answer the  
7 question as to what it means to have owned, what it means to  
8 have owned the shares: If I buy the shares -- if I buy shares  
9 in Danish stock by -- through a margin account, through  
10 leverage, does that mean I bought the shares? Does that mean I  
11 own them? What if I buy the shares and then immediately lend  
12 them out --

13 THE COURT: I would like to know what the facts are.

14 MR. ALLISON: You would need to know the facts. You  
15 would need to know what Danish law says about what it means to  
16 own, how title is passed --

17 THE COURT: You don't need to know Danish law unless  
18 there are some facts.

19 MR. ALLISON: Your Honor, all SKAT has asserted and  
20 alleged is that they were not the owner.

21 THE COURT: Yeah, right.

22 MR. ALLISON: Right. And ownership does require  
23 facts, but those facts also require the background of what the  
24 law is in determining what an owner is. Ownership doesn't --

25 THE COURT: So you think that it is conceivable that

1b5dcusM

1 under Danish law somebody who has a hundred shares of stock in  
2 General Motors actually is an owner of some Danish shares?  
3 Yeah? You think that's possible?

4 MR. ALLISON: All I was saying, your Honor --

5 THE COURT: Do you think if we have a plaintiff here  
6 who owns one, and only one, security, common stock of General  
7 Motors -- I shouldn't have said "plaintiff," I should have said  
8 defendant.

9 MR. ALLISON: Understood, your Honor.

10 THE COURT: -- that there is some interpretation of  
11 Danish law under which that individual owns stock in a Danish  
12 company?

13 MR. ALLISON: No. I think the question is whether if  
14 I buy shares of Danish stock, when do I obtain title to that  
15 stock to be an owner?

16 THE COURT: So the premise is that somebody, these  
17 defendants, each and every one of them, in fact bought shares  
18 of a Danish stock, a Danish company, in one manner or another,  
19 leveraged, not leveraged, who knows, right?

20 MR. ALLISON: That very well could be the fact, you  
21 are right.

22 THE COURT: It is conceivable but it is inconsistent  
23 with it.

24 MR. ALLISON: I'm sorry?

25 THE COURT: The complaint is inconsistent with it.

1b5dcusM

1                   MR. ALLISON: All the complaint says is that in SKAT's  
2 view of the world these defendants did not own their shares.

3                   THE COURT: It doesn't say that. It doesn't say that  
4 at all.

5                   MR. ALLISON: It alleges that they did not own the  
6 shares.

7                   THE COURT: Right. It doesn't say anything about  
8 SKAT's view.

9                   MR. ALLISON: Well, it is an allegation so it has to  
10 be their view. But that doesn't change the fact that we need  
11 to know what it means to own shares.

12                  THE COURT: Never mind. Go ahead.

13                  MR. ALLISON: Your Honor, this is an important point.  
14 This is an important part of the issue. Indirect enforcement  
15 of a foreign tax revenue law requires us to understand the  
16 context in which the allegation is made. SKAT is alleging that  
17 they didn't own the shares, that the defendants didn't own the  
18 shares. But that doesn't answer any question, because if I buy  
19 shares -- if I called my broker -- your Honor, if I called my  
20 broker and I say I would like to buy a hundred shares of pick  
21 your favorite, you know, Danish company, OK, then what happens?  
22 Do I acquire title at that point? Do I own the shares? No.  
23 Because it's probably, as you know, your Honor, we don't  
24 receive stock certificates anymore. I don't have any stock  
25 certificates that say that I own shares. I get a statement

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1 ultimately from my broker, or a confirmation from my broker  
2 that says I've been allocated 100 shares of X company. But who  
3 knows, the title may be in the name of the broker, the  
4 custodian or some state depository. We don't know.

5 That's a question of Danish tax law. What does Danish  
6 tax law look to to determine when ownership is obtained? The  
7 bare allegation that defendants don't own shares doesn't tell  
8 you anything without understanding, interpreting, and applying  
9 Danish tax law, otherwise this is just some exercise in  
10 futility. We'll constantly be here listening to facts without  
11 any context. And that's what the revenue rule is intending --  
12 specifically is designed to prohibit, from us having to get  
13 into the background of the context of the legal issues going on  
14 in Denmark.

15 And on top of that, your Honor, we've got obviously  
16 Danish tax administrative proceedings that are ongoing  
17 analyzing these same issues. Obviously, it seems very  
18 premature and very intrusive for us to be asking ourselves to  
19 address an issue that is going its way through a system in  
20 Denmark that will eventually go probably into judicial  
21 proceedings in Denmark. And so it would seem inappropriate, at  
22 best, for U.S. courts to be applying and interpreting Danish  
23 law, particularly in a manner that could end up being  
24 inconsistent with the ultimate outcome of those proceedings in  
25 Denmark.

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1 (Pause)

2 Your Honor, so the overall context, the overall layer  
3 of all of this is that there is not an allegation that this is  
4 a hoax, that this is some massive, you know, series of  
5 transactions that never occurred. The only claim here is a  
6 lack of ownership. A lack of ownership, as I said, is not --  
7 first of all, is not even a question under Danish law, Danish  
8 tax law. It is only a question of beneficial ownership. But  
9 it doesn't matter. Whether it is beneficial ownership, legal  
10 ownership, equitable ownership, whatever kind of adjective that  
11 you want to use to describe the ownership, it still requires  
12 the application of Danish law to understand that and to be able  
13 to determine what any facts could possibly mean in that  
14 context.

15 And there is no purpose, in our view, of getting into  
16 a factual analysis without understanding and applying and  
17 interpreting Danish tax law. And when you look at the  
18 termination letters that were issued by SKAT, you look at the  
19 appeals that are being filed in response to SKAT's  
20 terminations, you are seeing a debate over what it means under  
21 Danish tax law to get into these issues of ownership and  
22 beneficial ownership.

23 And in addition, your Honor, when you look at the  
24 treaty itself between the United States and Denmark, which  
25 ultimately is what is going to be relevant at the end of the

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1 day, the treaty itself requires a determination of beneficial  
2 ownership. Article 10 of the treaty says that the issue of  
3 whether the pension plans here are entitled to an exemption  
4 from withholding tax under Danish law must be decided by the  
5 internal law of Denmark. That is what is provided for in the  
6 treaty and the technical explanation. There is no wavering on  
7 that.

8 And so if we go down this road, your Honor, we are  
9 stuck now analyzing internal Danish law both for purposes of  
10 the ultimate outcome in terms of the substantive determination  
11 as well as the effect on the treaty, and that is exactly why  
12 the revenue rule does not permit U.S. courts to be addressing  
13 these kinds of questions, your Honor.

14 THE COURT: OK. Thank you.

15 MR. ALLISON: Your Honor, would you like me to address  
16 the other side, the 12(b)(6) issues, or would you like to defer  
17 that?

18 THE COURT: Well, you've used your half hour so --

19 MR. ALLISON: OK. Thank you, your Honor.

20 THE COURT: I don't need to hear from the other side.

21 I intend to deny this motion unless something radical  
22 changes in my mind between now and the issuance of an opinion.  
23 The longer and harder I have reflected about it, the clearer  
24 that result seems to me.

25 This motion is extremely premature. It is conceivable

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1 that at some point, depending on how things develop, there may  
2 be a case for application of the revenue rule, but it is not  
3 now. At least that's my present view. And in light of the  
4 fact that it will take some time to write on this, I thought it  
5 only fair to let you know.

6           OK. Thank you.

7           (Adjourned)

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